(21)

Nos. 1073-1074

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1944

■

HOMER FRANKLIN PARSONS, *Petitioner*
v.
UNITED STATES OF AMERICA

■

OTTO ANFIN JENSEN, *Petitioner*
v.
UNITED STATES OF AMERICA

■

JOINT PETITION

for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

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TO THE SUPREME COURT OF THE UNITED STATES:

Petitioners, Homer Franklin Parsons and Otto Anfin Jensen, present this their joint petition for writs of certiorari and show unto the Court as follows:

Summary of Matters Involved

1. *Preliminary Statement.*

Although these two petitioners were ordered to report under the Regulations before the amendment providing for the preinduction physical examination and have not exhausted their administrative remedies by a completion of the selective process according to *Falbo* v. *United States*, 320 U. S. 549, the questions presented by this petition have neither been decided nor foreclosed by the *Falbo* decision. New questions are presented. The challenge to the administrative orders in these cases goes deeper than an attack

against the mere propriety of the boards' classification. Here the Court is called upon to consider whether the draft boards violated the rights and liberties of each petitioner contrary to the due process clause of the Fifth Amendment and the specific provisions of the Act and Regulations. Accordingly questions analogous to those presented to the Court in *Giese* v. *United States,* No. 192 October Term, 1944, decided January 8, 1945, 65 S. Ct. 437, are here urged upon the Court. Also the constitutionality of the Act and Regulations requiring an exempt registrant to report for induction to complete the selective process is challenged. Moreover, the Court is here called upon to reconsider the rule announced in the *Falbo* case for reasons which shall be discussed later.

2. *Opinion of Court Below.*

The opinion of the United States Circuit Court of Appeals is not yet reported in the Federal Reporter. It appears in the record certified to this Court. (P. 161, J. 138)*

3. *Statutory Provisions Sustaining Jurisdiction.*

The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

4. *Timeliness of this Petition.*

The decision of the Circuit Court of Appeals was entered on January 22, 1945. (P. 161, J. 138) Upon application timely made the time for filing a petition for rehearing was enlarged. Within such time a petition for rehearing was duly filed. (F. 181)** The petition was denied on February 19, 1945. (F. 182) The judgment of the court below became final on February 19, 1945. (P. 164, J. 141)

* Figures enclosed in parentheses refer to pages of the printed records. Pages of the *Parsons* record are prefixed by the letter P. Pages of the *Jensen* record are prefixed by the letter J.

** A joint petition for rehearing was filed in the *Parsons, Jensen* and *Flakowicz* cases. The proceedings on the petition for rehearing are printed only in the *Flakowicz* record and hence the references prefixed by the letter F refer to the pages of that record.

5. *Statutes and Regulations Involved.*

Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended, (50 U. S. C., Appendix ss. 301-318) are drawn in question here, together with Sections 601.5, 622.44, 623 1, 623.2, 623.21, 623.61, 625.1, 625.2, 626.1, 627.12, 629.1-629.35, 633.2, 633.21, 642.41 and 642.42 of the Selective Service Regulations (32 C. F. R. Supp., 601.5 et seq.) promulgated by the President under said Act.

6. *Constitutional Provisions Involved.*

Clause 3 of Section 9 of Article I prohibiting enactment of bills of attainder. Clauses 1 to 3 of Section 2 of Article III investing the judicial powers. The Fifth and Sixth Amendments guaranteeing the rights of defendants in criminal prosecutions and securing due process of law.

7. *Questions Presented.*

(1) Are the Act and Regulations, which have been construed so as to require registrants who are exempt to report for induction as a condition precedent to judicial review and so as to penalize the exempt registrants who fail to respond to an illegal order by denying them the right to challenge the classification, void because constituting a bill of attainder contrary to clause 3, Section 9 of Article I of the United States Constitution?

(2) Are the Act and Regulations thus construed void because denying to petitioners their right to judicial trials, to urge their defense of no duty under the Act, to prove their innocence, and to jury trials, contrary to Article III, the due process clause of the Fifth Amendment and to the Sixth Amendment, United States Constitution?

(3) Can petitioners, in defense to the indictments, show that the proceedings of the Selective Service System and the orders to report for induction were void because the agents of said System had violated the due process clause

of the Fifth Amendment to the United States Constitution in arriving at their classification and in ordering them to report for induction when the undisputed evidence showed that they were exempt from all training and service under the Act?

(4) Does the trial court or the jury have the duty and right, upon the trial of an indictment charging an unlawful failure to report for induction, to consider and determine whether the draft boards violated the substantive rights of petitioners as exempt registrants, contrary to the due process clause of the Fifth Amendment to the United States Constitution?

(5) Can petitioners, in defense to the indictments, show that the proceedings of the Selective Service System and the orders to report for induction were void because the agents of said System had violated the due process clause of the Fifth Amendment to the United States Constitution by denying hearings through failure to consider the undisputed evidence before the agency showing that they were exempt from all training and service?

(6) Does the trial court have the duty and right to permit petitioners to show that they were not guilty and that the indictments were void because based on orders of the boards made (a) in excess of authority of the boards, (b) beyond the jurisdiction of the boards, (c) contrary to law, (d) without support of substantial evidence, (e) contrary to the undisputed evidence, (f) arbitrarily and capriciously, (g) contrary to the Constitution by depriving petitioners of rights and liberty without due process of law, and (h) in violation of the Regulations?

(7) Does the trial court have the duty and right to permit petitioners to show that they were not guilty and that the indictments were void because based on orders of the boards made (a) in excess of authority of the boards, (b) beyond the jurisdiction of the boards, (c) contrary to

law, (d) without support of substantial evidence, (e) contrary to the undisputed evidence, (f) arbitrarily and capriciously, (g) contrary to the Constitution by depriving petitioners of rights and liberty without due process of law, over the objection and exception by petitioners that the exclusion of such evidence denied their right to judicial trials and jury trials contrary to clause 3, Section 9 of Article I, Article III, and the Fifth and Sixth Amendments to the United States Constitution?

(8) Did the trial courts err in excluding evidence offered by petitioners to show that they were not guilty and that the indictments were void because based upon orders of the boards made (a) in excess of authority of the boards, (b) beyond the jurisdiction of the boards, (c) contrary to law, (d) without support of substantial evidence, (e) contrary to the undisputed evidence, (f) arbitrarily and capriciously, (g) contrary to the Constitution by depriving petitioners of rights and liberty without due process of law, and (h) in violation of the Regulations?

(9) Did the trial courts err in charging the juries that they could not consider the question of whether or not petitioners were exempt as ministers and whether or not the draft boards had acted in an arbitrary and unconstitutional manner, and that the only question to be decided was whether or not the petitioners knowingly failed to report for induction, over the objection of petitioners that they were denied their rights to judicial trials and jury trials, contrary to clause 3, Section 9 of Article I, Article III, and the Fifth and Sixth Amendments to the United States Constitution?

(10) Did the trial courts commit error in refusing the requested instructions of petitioners, all of which required the juries to consider and determine whether the draft boards' orders were void because the Selective Service System had violated the substantive rights of petitioners as exempt registrants contrary to the due process clause of the

Fifth Amendment to the United States Constitution?

(11) Since the records before the Selective Service System show that petitioners were duly recognized ministers of religion under the Selective Training and Service Act and the Regulations thereunder, were they exempt from all training and service under the Act?

(12) Did the Selective Service System exceed its authority in classifying petitioners as liable for training and service and in ordering the petitioners to report for induction in excess of the jurisdiction of said Selective Service System?

(13) Did the Selective Service System act arbitrarily and capriciously in classifying petitioners as liable for training and service when there was no evidence to show that they were not ministers of religion as claimed and the findings of the agency were contrary to the evidence?

(14) Should judicial review of the action of the administrative agency in ordering petitioners to report be had by trial *de novo* in so far as it affects the classification of petitioners?

(15) Did the trial courts commit error in refusing the requested instructions of petitioners requiring the juries to consider whether or not their honest good-faith belief that they were exempt as ministers of religion under the Act in determining whether or not the petitioners are guilty?

8. *Statement of Cases.*

THE PARSONS CASE

HISTORY

This criminal action was begun by indictment returned against petitioner, Homer Franklin Parsons, in the United States District Court for the Eastern District of New York. (3, 6-7) Petitioner was charged with failing to perform a duty required of him under the Selective Training and Serv-

ice Act of 1940 and the Regulations promulgated thereunder, on July 1, 1943, in that he "did unlawfully, wilfully and knowingly fail and neglect to report for such induction at the time and place fixed in said notice". (6-7)

Upon a plea of "not guilty" (3) trial to a jury began on December 8, 1943, before the Honorable Grover M. Moscowitz, United States District Judge. (8)* The evidence was concluded December 10, 1943. (38) At the close of the Government's case and at the close of all the evidence, petitioner moved for a dismissal of the indictment, a judgment of acquittal and a direction of a verdict of "not guilty" in which the reasons were stated extensively. (20-22, 38) On denial thereof petitioner excepted. (21, 38) At the close of all the evidence petitioner submitted to the court his requested charges. (50-82) Counsel for petitioner and for the Government summed up the evidence. (40-41)

The court charged the jury (41-45) to which the petitioner objected and excepted (44-46), as a whole, for failure to charge as requested in petitioner's requested charges. (46-48) All of petitioner's requested charges were refused and exceptions allowed. (46-48)

The jury returned a verdict of "guilty". (49) Freedom and bail of petitioner was continued until sentence on December 27, 1943. (49) Thereupon petitioner was sentenced to 2½ years and committed to the custody of the Attorney General in such place of confinement as may be designated. (4, 5-6) On December 27, 1943, written notice of appeal was served and filed. (4) He timely filed his assignments of error which support each ground of this petition. (137-155)

STATEMENT OF FACTS

Homer Franklin Parsons registered with local board No. 133, Brooklyn, New York, on October 16, 1940. (9) At that time he was 22 years of age. (88) The local board mailed him a Questionnaire which was properly filled out,

* Upon a previous trial the jury could not agree on a verdict and a mistrial was declared. (3)

returned and filed on January 8, 1941. (84-88) The questionnaire was received in evidence. (13) It showed that petitioner had acted as a regular and duly ordained minister of religion, of Jehovah's witnesses and Watchtower Bible & Tract Society since 1937. (85, 87, 91) He was reared during childhood as one of Jehovah's witnesses to become a minister. (22-23) He followed a course of study in preparing himself for the ministry. (23-24) At the time of his classification he was assigned to a large congregation of more than 250 individuals known as the Astoria, New York, Unit of Jehovah's witnesses and in relation to which he stood as do the orthodox clergy of the recognized religious denominations. (25) He regularly addressed and preached to the congregation on such occasions as it met each week; additionally he performed duties as an evangelistic minister from house to house. (26) His full time is devoted to that activity. (26) The court received in evidence petitioner's exhibit Q which was a copy of Opinion No. 14 (Amended) issued by Selective Service National Headquarters concerning the ministerial status of Jehovah's witnesses. (33, 133-136)

On May 12, 1941, the local board placed petitioner in Class I-A (89) He made a request to appear before the board on May 13, 1941, which was granted (90), and he accordingly appeared on May 16, 1941, and filed additional material. (90) On May 19, 1941, he was continued by the local board in Class I-A. (90) On May 21, 1941, he appealed to the board of appeals. (89, 90) On July 2, 1941, he was classified in Class III-A because of marriage. (90) On September 28, 1942, he was reclassified to Class I-A. (9, 90) On October 7, 1942, he appealed therefrom to the board of appeals (9, 90), which board affirmed the I-A classification on April 1, 1943. (9, 90) On June 19, 1943, the local board mailed him an order to report for induction at 6:00 A.M., July 1, 1943. (9) On July 12, 1943, he was mailed a notice of suspected delinquency and commanded to appear July 18, 1943. (10) He did not appear but mailed a letter to the local

board on July 17, 1943, explaining his reasons (10) which was excluded from the evidence (17) and is printed in full in the record. (106-111) The letter related to the petitioner's good-faith motives in not reporting and showed that he did not knowingly and wilfully disobey the law. (106-111)

ISSUES INVOLVED AND HOW RAISED

The petitioner offered evidence to show that he, in good faith, believed that he was exempt and under no duty to respond to the order which was offered upon the issue of whether he knowingly and illegally failed to obey the order. (12-15, 26-31) The court held that this evidence was not admissible. (15-16, 31-33) Petitioner urged this evidence upon the authority of *United States* v. *Murdock*, 290 U. S. 389, 396, which was called to the attention of the court. (21-22, 39) The court held that the *Murdock* decision did not permit reception of the evidence. (21-22, 39)

The court charged the jury in such a manner as to eliminate entirely from the jury's consideration the good faith and honest belief of petitioner that he was exempt. (43-44) Exception was taken to this portion of the charge. (45) The court was requested to charge the jury, in petitioner's requested instruction number 38, that if the petitioner honestly believed that he was not required to obey the order because he was exempt as a minister this fact could be considered in determining whether he was guilty of knowingly and unlawfully failing to obey the order. (80)

Upon the trial petitioner excepted to the court's excluding the evidence offered to show that the draft boards violated the Act, the Regulations and the Constitution in classifying him and in ordering him to report, on the grounds that such ruling denied him his rights and liberty without due process of law, denied him a judicial trial and converted the Act into a bill of attainder contrary to Clause 3 in Section 9 of Article I of the United States Constitution, and contrary to the Fifth and Sixth Amendments to the Constitution. (21, 39) Exception was also taken to the

court's charge on the grounds that the court's charge excluded from consideration by the jury whether the draft boards illegally violated the Act and Regulations in classifying petitioner, violated his constitutional rights and denied him a judicial trial, etc. (48-49)

SPECIFICATION OF ERRORS

The petitioner urges upon this petition assignments of error numbers 1 to 82 inclusive. (137-155)

The Jensen Case

HISTORY

This criminal action was begun by indictment returned against petitioner, Otto Anfin Jensen, in the United States District Court for the Eastern District of New York. (3, 5-6) Petitioner was charged with failing to perform a duty required of him under the Selective Training and Service Act of 1940 and the Regulations promulgated thereunder, on November 23, 1943, in that he "did unlawfully, wilfully and knowingly fail and neglect to report for such induction at the time and place fixed in said notice". (5-6) Petitioner was arraigned and pleaded not guilty. (3) He withdrew his plea of not guilty for the purpose of filing motion to quash. (3) Motion to quash was filed and overruled by the court (3, 6-7, 8), to which exception was allowed. (8) Petitioner renewed his plea of not guilty. (3) Trial to a jury before United States District Judge Grover M. Moscowitz began on March 22, 1944. (3, 9) The evidence was concluded on March 23, 1944. (25, 34) At the close of the Government's case and at the close of all the evidence petitioner moved for a dismissal of the indictment, a judgment of acquittal and direction of a verdict of not guilty, in which the reasons were stated extensively. (19-21, 34) On denial thereof, petitioner excepted. (21, 34) At the close of all the evidence petitioner submitted to the court his requested charges. (50-80) Counsel for petitioner and for the Government

summed up the evidence. (34) The court charged the jury (35-39), to which the petitioner objected and excepted. (39-42) The petitioner's requested charges were refused and exceptions allowed. (42-46) The jury returned a verdict of guilty. (3, 46) Petitioner was remanded to custody for sentence on March 27, 1944, at which time he was committed to the custody of the Attorney General for a period of three years. (3, 4, 47) On March 27, 1944, notice of appeal was served and filed. (3, 110-112) He timely filed his assignments of error to support each ground of this petition. (113-132)

STATEMENT OF FACTS

Otto Anfin Jensen registered with local Board No. 723, located at Valley Stream. New York, on February 15, 1942. (11) He was mailed a questionnaire which was properly filled out, returned and filed on May 15, 1942. (11, 80-85) The questionnaire was received in evidence. (11, 80-85) It showed that defendant had acted as a regular and duly ordained minister of religion, of Jehovah's witnesses and the Watchtower Bible & Tract Society since 1939 (83), and that he had since such time been regularly and customarily serving in such ministry. (83) It showed that he also had a secular occupation, working with a venetian blind company, cutting and finishing venetian blinds. He had one year's experience in this kind of work. He completed eight years of elementary school and two years of high school and since 1936 attended a school maintained by Jehovah's witnesses for Bible studies in preparation for the ministry. (81) He claimed that he should be classified as an ordained minister of religion in Class IV-D. (84)

Petitioner testified that he represented the Watchtower Bible and Tract Society and Jehovah's witnesses as an ordained minister preaching the Gospel of God's Kingdom and bringing the message that Jehovah God has provided for the people at this time by public proclamation. (22-23)

On May 20, 1942, five days after he returned his questionnaire to the local board, his claim for exemption was granted and he was placed in Class IV-D. (84) On January 2, 1943, he was placed in Class IV-E, making him liable for training and service in a conscientious objector's camp. (85) On a hearing before the board, he was continued in Class IV-E on January 10, 1943. (85) He duly appealed to the board of appeals. On March 16, 1943, the board of appeals denied his claim for exemption and found he was not entitled to classification as an ordained minister exempt from all training and service. (85) Thereafter the file was returned to the board of appeals and on August 17, 1943, the local board's classification of IV-E was reversed and the petitioner placed by the board of appeals in Class I-A as liable for training and service in the armed forces. (12, 85) He appealed to the State Director on August 24, 1943, and his file was sent to the office of the State Director on September 24, 1943, and returned without action being taken by the Director on October 18, 1943. On November 11, 1943, Jensen was mailed a notice to report for induction on November 23, 1943. He did not appear for induction but previous thereto, on November 17, 1943, he mailed the local board a letter stating that his file had not been sent to the National Headquarters. (12) On November 23, 1943, the local board received a letter from him protesting against the board's arbitrary action in changing his classification from IV-D to I-A. On November 24, 1943, he was mailed a notice of delinquency. He did not appear but again sent a letter which was received by the board on November 29, 1943. (13)

ISSUES INVOLVED AND HOW RAISED

Petitioner attempted to cross-examine the clerk of the local board with reference to the history of the petitioner's classification and the evidence contained in the file that was considered by the board at the time of each classification.

(14-15) Petitioner offered the entire file (Defendant's Exhibit A) before the local board for the purpose of showing that the action of the board in changing his classification from IV-D to IV-E when there was no change in his status was a violation of the Act and Regulations, contrary to the evidence, arbitrary and capricious, in violation of the due process clause and without support of any evidence. (16-18)

The file showed that Jensen had been one of Jehovah's witnesses since 1936, was duly ordained as a minister of religion on December 25, 1939 (86-87), was classified in Class IV-D on May 21, 1942, discontinued all secular work on August 22, 1942, and ever since has devoted his full time to preaching the gospel of God's Kingdom. (88-89) That he was connected with the Jamaica Unit of the New York Company of Jehovah's witnesses and recognized by that congregation as standing in the same relation to it as do ministers of the orthodox denominations to their respective congregations. (90-91) In addition to performing missionary, evangelistic work, he delivered sermons to the congregation. (92-93) Opinion No. 14 of National Headquarters of the Selective Service System concerning the ministerial status of Jehovah's witnesses appeared in the file. (94-97) There also was in the file a certificate of ordination showing that the petitioner was recognized by the Watchtower Bible and Tract Society, legal governing body of Jehovah's witnesses, as a full-time duly ordained minister of religion. (98-99) Petitioner's statement of facts on appeal to the board of appeal was in the file (100-101), also his letter to the State Director for requested action (102-104), and the order to report for induction. (106-107)

Petitioner offered evidence to show that he in good faith believed that he was exempt from all training and service and had no duty to respond to the order upon which the indictment was based. This evidence was offered to show that he did not knowingly and illegally fail to perform a duty that rested upon him under the law. Oral testimony,

as well as evidence submitted to the local board, was offered for this purpose. The evidence was excluded. (27-28, 29) Petitioner excepted and urged the evidence upon the authority of *United States* v. *Murdock*, 290 U. S. 389, 396. (27-28, 29) The court held that the honest and good-faith belief that petitioner was exempt and had no duty was not relevant. (27-28, 29)

The court charged the jury in such a manner as to eliminate entirely from the jury's consideration the good faith and honest belief of petitioner that he was exempt. (36-38) Exception was taken to this portion of the charge. (41-42) The court was requested to charge the jury in petitioner's requested instruction number 38 that if the petitioner honestly believed that he was not required to obey the order because he was exempt as a minister, this fact could be considered in determining whether he was guilty of knowingly and unlawfully failing to obey the order. (77-78)

Upon the trial petitioner excepted to the court's excluding the evidence offered to show that the draft boards violated the Act, the Regulations and the Constitution in classifying him and in ordering him to report, on the grounds that such ruling denied him his rights and liberty without due process of law, denied him a judicial trial and converted the Act into a bill of attainder contrary to Clause 3 in Section 9 of Article I of the United States Constitution, and contrary to the Fifth and Sixth Amendments to the Constitution. (17-18, 19-21) Exception was also taken to the court's charge on the grounds that the court's charge excluded from consideration by the jury whether the draft boards illegally violated the Act and Regulations in classifying petitioner, and denied his constitutional rights, thereby depriving him of a judicial trial, etc. (42)

SPECIFICATION OF ERRORS

The petitioner urges upon this petition assignments of error numbers 1 to 67 inclusive. (113-132)

Proceedings in Circuit Court of Appeals

The causes were submitted on January 16, 1945 to the court below for decision, and on January 22, 1945 said court affirmed the judgments of conviction according to an opinion filed on that date. (P. 161, J. 138) The time for filing a petition for rehearing was duly enlarged by an order of the court. A petition for rehearing was timely filed. (F. 181) It was denied on February 19, 1945. (F. 182) Orders for mandates on February 19, 1945 were entered, affirming the judgments of the district court. (P. 164, J. 141) On that date the judgments of affirmance became final.

Reasons Relied on for Allowance of Writ

Since the *Falbo* decision was handed down by the Court on January 3, 1944 matters have intervened which call for a reconsideration of the doctrine announced in the *Falbo* case in light of changed events. It is submitted that it appears that the decision of the Court in the case of *Western Union Telegraph Company* v. *Lenroot,* No. 49 October Term 1944, decided on January 8, 1945, announced a doctrine of statutory construction which is directly contradictory to and inconsistent with the doctrine announced and applied in the *Falbo* case. In both statutes under consideration in these cases there was a complete absence of any prohibition or any language commanding a prohibition of the contention sought for. In the *Lenroot* case the Western Union Company contended that the absence of the language of prohibition in the statute did not authorize a prohibition against child labor in the statute as applied. In the *Falbo* case it was contended that the absence of a prohibition or language indicating a prohibition could not authorize a prohibition of proof of the illegality of an administrative order by an exempt person in defense to an indictment charging him with violation of the order.

In the *Lenroot* case it was said that absence of language would not permit reading the prohibition into the statute.

In the *Falbo* case it was said that absence of language would permit reading the prohibition into the statute.

In the *Falbo* case the Court said: "Against this background the complete absence of any provision for such challenges in the very section providing for prosecution of violations in the civil courts permits no other inference than that Congress did not intend they could be made."

In the *Lenroot* case the Court said: "Ascertainment of the intention of Congress in this situation is impossible. It is to indulge in a fiction to say that it had a specific intention on a point which never occured to it. Had the omission of a direct prohibition of this employment been called to its attention, it might well have supplied it, for any reason we can see. . . . It is admitted that it is beyond the judicial power of innovation to supply a direct prohibition by construction. We think we should not try to reach the same result by a series of interpretations so far-fetched and forced as to bring into question the candor of Congress as well as the integrity of the interpretative process."

Attention of the Court is called to the language of the court in *Panama Ref'g Co.* v. *Ryan*, 293 U. S. 388 where it was said: "If a citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission." Compare *California* v. *Latimer*, 305 U. S. 255, 261 (where, although statute was silent as to defenses, judicial review of the administrative orders was said to be available).

A draft board order issued against an exempt person is *ultra vires* because not within the authority of the administrative agency. *Wise* v. *Withers*, 3 Cranch 331; *Ex parte Cain*, 39 Ala. 440. Under the 1940 Act it has been said that a draft board has no jurisdiction to order a minister of

religion to perform duty for training and service. *Lehr* v. *United States,* (CCA 5th), 139 F. 2d 919, 921-922.

It is the position of petitioners that insofar as the *Falbo* decision is urged here as *stare decisis* it is an erroneous decision and is here challenged again as being contrary to the letter and spirit of the Constitution. This decision injected into the body of constitutional law must not be considered inextricable from that body and binding against the plain truth of the Constitution. The Court is requested to reconsider it. "The only protection which we can have against these results is to hold the court rigorously to the terms of the Constitution, to subject all its decisions to the unyielding test of reason, and, when any one of them fails to find a rational support in the Constitution, to recognize that it is not the law of the land." (Abbott, *Justice and the Modern Law* (1913) pp. 76-78)

The Court in reaching the decision that a minister of religion must report for induction ignored entirely the plain provision made by Congress that ministers "shall be exempt from training and service (*but not from registration*) *under this Act.*" (Sec. 5 (d)) (Italics added) This shows that the Congress intended that no further duty under the Act was required of ministers of religion other than registration with the board as a minister of religion.

The constitutional questions raised here are not foreclosed by the decision in *Falbo* v. *United States,* 320 U. S. 549. The opinion in the Falbo case states that there was no attack upon the parts of the Act and Regulations requiring the registrant to comply with the orders of the board. In these cases there is an attack upon the statute and regulations which require the registrant to submit to the orders as a condition precedent to judicial review on the grounds that a judicial trial of a judicial question is denied contrary to specific provisions of the Constitution. Moreover these requirements are attacked as having been converted into a bill of pains and penalties contrary to Clause 3, Section 9

of Article I of the United States Constitution prohibiting bills of attainder.

These reasons show that a decision has been made on important questions in a way probably in conflict with applicable decisions of this court. If the court does not conclude that there are applicable decisions contrary to the holdings of the courts below then petitioners assert that the courts below have decided federal questions which have "not been, but should be, settled by this court" and that the circuit court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision" so as to require an exercise of the court's power of review to halt the same.

Moreover the decision of the court in the *Falbo* case denying judicial review to a citizen of an illegal administrative order because of the war emergency was in effect suspending Article III of the United States Constitution and repealing the due process clause of the Fifth Amendment in draft cases. The decision does not measure up to the wartime decisions of the courts of Britain, whose Parliament is vested with supreme power of the realm. The right to judicial review of an administrative order made under the Defence of the Realm Act and shown to be illegal, was not by implication denied (as was done by this Court in the *Falbo* decision) by the demands of the war emergency in *Chester* v. *Bateson,* 1920, 1 K. B. D. 829. There Mr. Justice Darling, speaking for the English Court of Appeal said, *inter alia,* " . . . and I ask myself whether it is a necessary or even reasonable way to aid in securing the public safety and the defence of the realm to give power to a Minister to forbid any person to institute any proceedings to recover possession of a house so long as a war worker is living in it."

WHEREFORE, your petitioners pray that this Court issue writs of certiorari to the Circuit Court of Appeals for the Second Circuit directing such court to certify to this Court for review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that the judgments of the said Circuit Court of Appeals, affirming the judgments of conviction entered by the District Court be here set aside and petitioners dismissed from custody or, in the alternative, that the judgments be reversed and the causes remanded for a new trial not inconsistent with this court's opinion; and that your petitioners be granted such other and further relief in the premises as to this Court may seem just and proper in the circumstances.

HOMER FRANKLIN PARSONS and
OTTO ANFIN JENSEN, *Petitioners*
By HAYDEN C. COVINGTON
Counsel for Petitioners

[NOTE: For the supporting brief, reference is here made to the supporting briefs in the petitions for certiorari in *Clayton* v. *United States,* No. 886, October Term 1943, and *Lohrberg* v. *Nicholson,* No. 884, October Term 1943.]

Nos. 1073 and 1074

In the Supreme Court of the United States

OCTOBER TERM, 1944

HOWARD FRANKLIN [illegible], PETITIONER

v.

UNITED STATES OF AMERICA

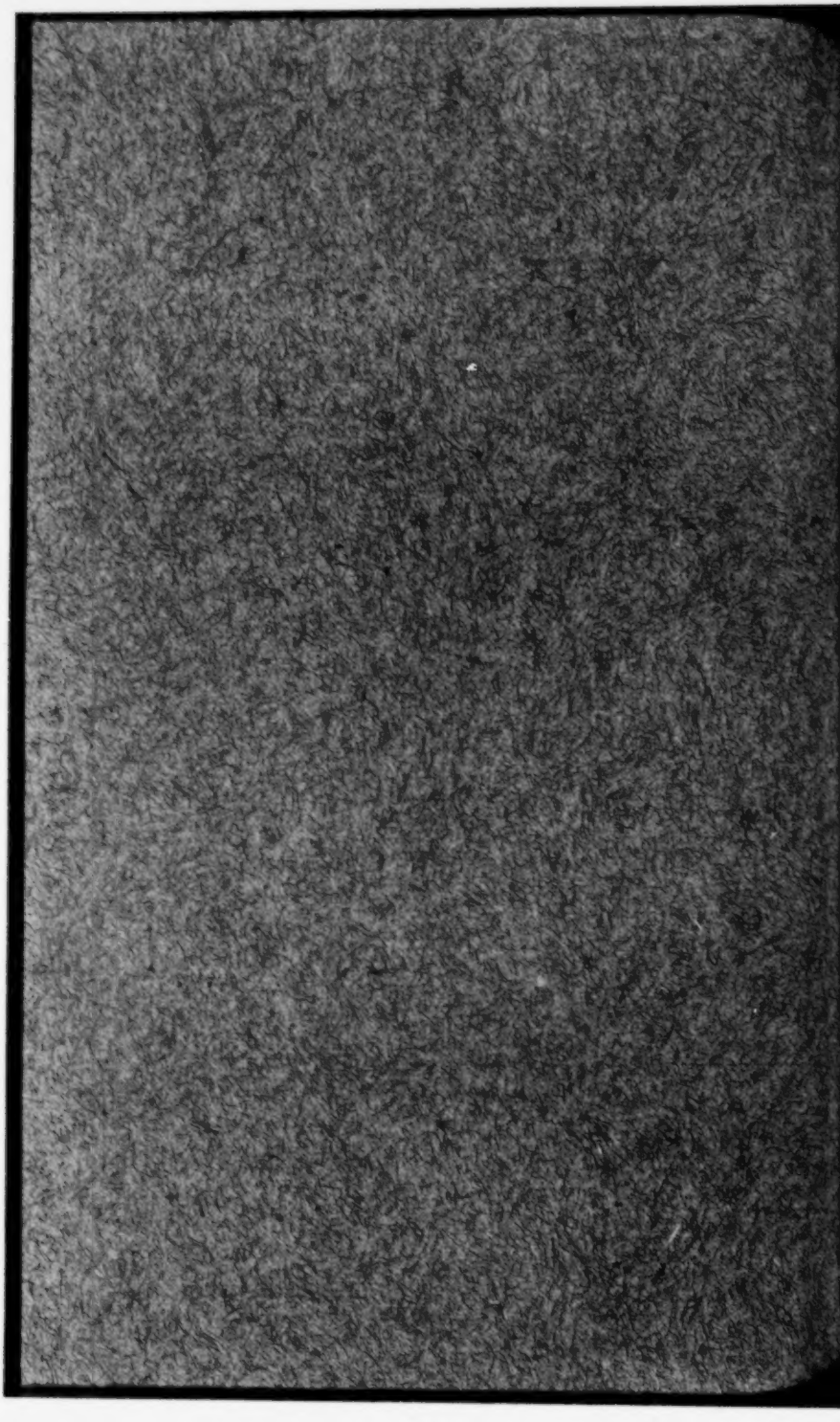
A[illegible] MARTIN JENSEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE [illegible] CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION



In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1073

HOMER FRANKLIN PARSONS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1074

OTTO ANFIN JENSEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners were separately indicted in the United States District Court for the Eastern District of New York for knowingly failing and neglecting to report for induction into the armed forces as required by orders duly issued to them

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by their local draft boards, in violation of the Selective Training and Service Act of 1940 (50 U. S. C. App. 301 *et seq.*) (No. 1073, R. 6–7; No. 1074, R. 5–6).

At their separate jury trials the evidence showed that petitioners, having full knowledge of their local boards' orders to report for induction, failed to do so (No. 1073, R. 10–11, 34–35; No. 1074, R. 12–13, 30). In the course of their trials the court excluded evidence offered by petitioners purporting to show that as Jehovah's Witnesses they were ministers of religion and that the Selective Service boards acted arbitrarily and capriciously in denying them classification as ministers and in classifying them for military service (No. 1073, R. 21, 29–33, No. 1074, R. 23–24, 29–30, 33). The court accordingly instructed the jury in each case that the only issue for their determination was whether the petitioner knowingly failed to obey the order of his draft board to report for induction (No. 1073, R. 43; No. 1074, R. 37–38). Petitioners were each convicted (No. 1073, R. 49; No. 1074, R. 46); petitioner Parsons was sentenced to imprisonment for a term of two and one-half years (R. 5–6) and petitioner Jensen for a term of three years (R. 4–5). Upon appeals, which were disposed of in a single opinion, the convictions were affirmed *per curiam* by the Circuit Court of Appeals for the Second Circuit (No. 1073, R. 161–164; No. 1074, R. 138–141).

Here, as in *Falbo* v. *United States*, 320 U. S. 549,[1] petitioners sought to defend their refusal to report for service on the ground that the orders to report were void in that they were based upon erroneous classifications. In the *Falbo* case, as in this petition (p. 17), it was urged that to deny review of a defendant's Selective Service classification in his criminal trial is to deny him a judicial trial. The decision of this Court in the *Falbo* case, rejecting such contentions as incompatible with the structure, history, and purposes of the Selective Training and Service Act of 1940, makes it unnecessary to reargue the question here.[2] Petitioners' characterization of the local boards' actions as "arbitrary and capricious" does not raise any additional constitutional questions. Petitioners complain only of the boards' refusals, upon the facts presented to them, to classify petitioners as ministers entitled to exemption under the Act. Additionally, they suggest (Pet. 6, 9, 13–14) that they were improperly denied an opportunity at their trials to prove that they had

[1] The pertinent Selective Service Regulations in effect at the time of petitioners' offenses were identical with those applicable in the *Falbo* case. Here, as in that case, the administrative process of selection had not been completed at the time of the offenses in question (see p. 553 of the *Falbo* decision).

[2] Substantially the same contentions urged by petitioners were likewise urged upon petitions for certiorari in *Clayton* v. *United States*, No. 886, October Term 1943, and *Stull* v. *United States*, No. 887, October Term 1943, in which certiorari was denied, 322 U. S. 745.

no felonious intent by showing that they believed they were ministers of religion and as such entitled to exemption under Section 5 (d) of the Act. However, Section 11 of the Act requires only a "knowing" failure or neglect to perform a duty required by the Act and the regulations issued under it. Petitioners do not deny that they intentionally failed to report for induction. In the circumstances their motives for their deliberate failure to report were of no significance. *Browder* v. *United States*, 312 U. S. 335, 340–341; *United States* v. *Illinois Central Railroad Company*, 303 U. S. 239, 242–243.[3]

Accordingly, it is respectfully submitted the petition for writs of certiorari should be denied.

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APRIL 1945.

[3] Contrary to petitioners' argument (Pet. 15–16), we perceive nothing in *Western Union Telegraph Co.* v. *Lenroot*, No. 49, decided January 8, 1945, which casts doubt upon the *Falbo* decision.

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